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*United States Court of Appeals for the Fourth Circuit*

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## ROBERT C. BYRD AND THE FOURTH CIRCUIT COURT OF APPEALS: AN ADDENDUM RESPECTING JUDGE ROBERT BRUCE KING

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*M. Blane Michael\**

Robert Bruce King was born in 1940 in White Sulphur Springs, Greenbrier County, West Virginia.<sup>1</sup> Known for his love of West Virginia, dedication to his family, and outstanding legal ability, Judge King has been serving on the United States Court of Appeals for the Fourth Circuit since 1998. Judge King was among the first group of West Virginians that Senator Robert C. Byrd and Senator John D. Rockefeller IV recommended for federal appointments when President Clinton assumed office in 1993.<sup>2</sup> As Senator Byrd observed at Judge King's investiture, "Robert Bruce King is a man who is eminently qualified to wear the black robe and assume the weighty responsibilities of a federal judge."<sup>3</sup>

Last spring the *West Virginia Law Review* published a tribute to Senator Byrd. The issue included an article by Judge King recounting the lives and careers of the Fourth Circuit judges appointed during Senator Byrd's tenure in the Senate.<sup>4</sup> Judge King declined to write about himself. I write to correct the omission because Judge King offers a rich and admirable story that should be told.

Judge King grew up in Organ Cave (Greenbrier County, West Virginia), where, until eighth grade, he attended a three-room school.<sup>5</sup> His father passed away in April 1950, when he was only ten years old, leaving his mother, Gladys

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\* Circuit Judge, United States Court of Appeals for the Fourth Circuit. I thank four of my law clerks, Elizabeth Mazur, Margaret Welles Renner, Indraneel Sur (2005-2006), and Charles Trumbull (2006-2007) for their help in preparing this article.

<sup>1</sup> Judge King is of Scottish ancestry and immensely proud of it. He is a member of the Bruce Family, which traces its lineage to Robert the Bruce, a fourteenth-century Scottish king.

<sup>2</sup> The senators asked the Clinton administration to allocate a third seat on the Fourth Circuit to West Virginia and recommended that the President nominate Judge King to fill that seat. See Press Release, Office of U.S. Sen. Robert C. Byrd (Mar. 8, 1993) (on file with author). West Virginia did not get the extra seat, but Judge King was later nominated to the Fourth Circuit in 1998.

<sup>3</sup> Sen. Robert C. Byrd (D - W. Va.), Investiture Ceremonies for Robert Bruce King as United States Circuit Judge for the Fourth Circuit, United States Court of Appeals for the Fourth Circuit Special Ceremonial Session at the United States Courthouse, Charleston, West Virginia 49-50 (Oct. 23, 1998) (transcript on file with author) [hereinafter King Investiture Ceremonies].

<sup>4</sup> Robert Bruce King, *Robert C. Byrd and the Fourth Circuit Court of Appeals*, 108 W. VA. L. REV. 607 (2006).

<sup>5</sup> Judge Robert B. King, King Investiture Ceremonies, *supra* note 3, at 62.

Holyman King, a widow at the age of thirty-one. Mrs. King “centered her universe around her family,” raising Judge King and his two siblings while working in the kitchen at The Greenbrier’s golf and tennis club.<sup>6</sup> Although she herself never graduated from high school, Mrs. King constantly encouraged her children in their studies, emphasizing that hard work and a good education were the best routes to success in life.<sup>7</sup> The King children took their mother’s advice to heart.

Judge King’s budding advocacy skills were recognized when he was only a 15-year-old sophomore at Greenbrier High School. Representing his local chapter of the Future Farmers of America (FFA), Judge King won an FFA-sponsored public speaking contest with a speech entitled, “Let’s Keep Our Soil at Home.”<sup>8</sup> His award for this honor was a \$25 savings bond.<sup>9</sup> The role that farming played in Judge King’s young life was quite secondary, however, to the role that “the ancient and honorable game of golf”<sup>10</sup> played, and continues to play. As a boy Judge King worked as a caddie at the famed Greenbrier resort where, according to the judge, he “learned life literally from the bottom up.”<sup>11</sup>

Judge King brought his passion for golf to West Virginia University (WVU), where he played for three years on the varsity men’s golf team. He earned a letter all three years and was captain of the team in 1961.<sup>12</sup> During his years on the golf team Judge King forged a close relationship with his coach, Ira Errett Rodgers, whom Judge King, with great passion and admiration, still considers “West Virginia’s finest athlete.”<sup>13</sup> Judge King fondly remembers leading his team to victory against the University of Pittsburgh in 1961, the year he served as team captain. “I vividly recall Coach Rodgers sitting with us after the match, on the porch at the old clubhouse [at the Morgantown Country Club] on top of [the] hill — literally crying with joy.”<sup>14</sup> (That season turned out to be Coach Rodgers’s last one. “He was, sadly, suffering from the cancer that took his life in early 1963.”<sup>15</sup>)

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<sup>6</sup> Press Release, West Virginia University, Alumni Endow WVU Scholarship to Honor Their Mother’s Commitment to Her Children (July 31, 2003), *available at* [http://hermes.as.wvu.edu/New\\_Folder/newsroom/newsreleases/2003/July/kingen.html](http://hermes.as.wvu.edu/New_Folder/newsroom/newsreleases/2003/July/kingen.html).

<sup>7</sup> *Id.*

<sup>8</sup> *Bobby King Wins FFA Public Speaking Contest for Greenbrier Valley Group*, BECKLEY POST-HERALD, Apr. 17, 1955. The speech did not advocate isolationism, as its clever title might suggest. Rather, it warned of the perils of soil erosion.

<sup>9</sup> *Id.*

<sup>10</sup> Warren Upton, King Investiture Ceremonies, *supra* note 3, at 21.

<sup>11</sup> Judge Robert B. King, King Investiture Ceremonies, *supra* note 3, at 62.

<sup>12</sup> Letter from William C. Field to author (July 19, 2006) (on file with author) [hereinafter Field Letter].

<sup>13</sup> Judge Robert B. King, Remarks at the Mountain Mush & Milk Banquet 4-7 (Oct. 21, 2005) (on file with author).

<sup>14</sup> *Id.* at 7.

<sup>15</sup> *Id.*

After earning a Bachelor of Arts degree from WVU in 1961, Judge King entered active duty as an officer in the United States Air Force, serving in the Office of Special Investigations. During his Air Force years he played golf in numerous armed services tournaments, “where he competed against many future PGA Tour professionals, including Orville Moody, who won the 1969 U.S. Open.”<sup>16</sup> After his discharge from the service in 1964 Judge King returned to rural Greenbrier County, where he worked as a school teacher. There he met another teacher, Julia Kay Doak, whom he married on April 16, 1965. The following year Judge King and Julia returned to Morgantown, where he attended the WVU College of Law. While in law school he was a member of the *West Virginia Law Review* and served as president of the Student Bar Association. He graduated Order of the Coif in 1968 and was awarded the Patrick Duffy Koontz Scholarship in recognition of his academic excellence, character, and leadership potential.<sup>17</sup>

As he was preparing to graduate, Judge King was “exceptionally lucky” in landing what turned out to be one of the most important jobs of his life: a clerkship with then U.S. District Judge John A. Field, Jr. in Charleston, West Virginia. More than thirty-five years later, Judge King attributed his success as a lawyer to Judge Field’s willingness to “give [him] a chance.”<sup>18</sup> As Judge King said, “Judge [Field], simply put, guided me through my life.”<sup>19</sup> Also important to Judge King was Judge Field’s attachment to the “ancient and honorable game of golf.”<sup>20</sup> As Judge King recalls, “On several occasions, both during and after my clerkship with Judge Field, he reminded me that golf was the sole and only reason he had ever hired me to be one of his law clerks.”<sup>21</sup> Judge Field’s son, William C. Field, recalls how that hiring came about: one day in the spring of 1968, Judge Field

was about to tee off on the Old White Course at the Greenbrier Hotel when Bob’s stepfather [Buster Gregory], the Starter on

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<sup>16</sup> Field Letter, *supra* note 12. Judge King retains his formidable skill as a golfer, scoring consistently in the seventies. His success, according to his friend and golfing companion Thomas R. Goodwin, “is based on his ability to hit the ball in the middle of the club face with a controlled and repeatable swing.” Memorandum from Thomas R. Goodwin to author (Aug. 10, 2006) (on file with author). Other friends “describe [Judge King’s] swing as being so smooth and sweet that it looks like honey pouring from a jar.” Field Letter, *supra* note 12.

<sup>17</sup> WVU Alumni - Robert B. King, [http://alumni.wvu.edu/about/board/bio/robert\\_king](http://alumni.wvu.edu/about/board/bio/robert_king).

<sup>18</sup> Judge Robert B. King, Portrait Unveiling in Honor of Honorable John A. Field, Jr., United States Circuit Judge, United States Court of Appeals for the Fourth Circuit Sitting En Banc at Richmond, Virginia at 8 (Sept. 24, 2003) (transcript on file with author).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 9.

<sup>21</sup> *Id.* at 10.

the Old White Course, told Judge Field that he had a pretty bright stepson who was about to graduate from law school. Judge Field told him to have his stepson call . . . about a job opening as [the judge's] law clerk. Bob called and an interview took place later that summer. Judge Field recounted many times how it took only a few minutes for him to decide Bob was going to be his law clerk. As Judge Field used to tell it, you could instantly see the intellect and quickness of Bob's mind just by looking at the spark in his eyes. Bob was hired on the spot.<sup>22</sup>

After his clerkship Judge King went on to practice law in Lewisburg, West Virginia, with the firm of Haynes & Ford.<sup>23</sup> Within a year he returned to Charleston to serve as Assistant United States Attorney (AUSA) in the Southern District of West Virginia.<sup>24</sup> He served in that position from 1970 until 1974,<sup>25</sup> distinguishing himself as a tough prosecutor. One of his most significant prosecutions as an AUSA involved a scheme to bribe a juror in the 1968 criminal trial of former West Virginia Governor William Wallace Barron and several associates, who were accused of corruption in state contracting.<sup>26</sup> During that 1968 trial the wife of the sequestered jury foreman approached Governor Barron's wife and sought cash in exchange for acquittals. Mrs. Barron relayed the bribery solicitation to the Governor, who set in motion a chain of events leading to the delivery of a \$25,000 cash bribe to the jury foreman's wife.<sup>27</sup> The jury acquitted Governor Barron but convicted four of his co-defendants.<sup>28</sup> Judge King became an AUSA in time to take an instrumental role in the jury bribery investigation, which began in late 1970. Judge King and his fellow prosecutors, U.S. Attorney W. Warren Upton and Department of Justice lawyer Charles F.C. Ruff, cracked the case in February 1971 when the jury foreman confessed to accepting the bribe.<sup>29</sup> In due course Governor Barron pled guilty, was sentenced to a prison term of twelve years, and became a government witness (examined by Judge King) in the trials of two others indicted in the jury bribery scheme.<sup>30</sup> The Barron case was not the only one in which Judge King confronted the politically powerful. As an AUSA he also prosecuted and convicted five Logan

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<sup>22</sup> Field Letter, *supra* note 12.

<sup>23</sup> Response of Robert Bruce King to Questionnaire for Judicial Nominees of the Committee of the Senate Judiciary Committee at 14 (July 3, 1998) [hereinafter King Questionnaire].

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 14-15.

<sup>26</sup> *Id.* at 26.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 26-27.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

County, West Virginia, public officials on civil rights charges relating to vote fraud and election theft.<sup>31</sup>

In 1974 Judge King returned to private practice at the Charleston law firm of Spilman, Thomas, Battle & Klostermeyer, where he was a partner from 1975 until mid-1977.<sup>32</sup> It surprised no one when Senator Byrd in 1977 recommended that the 37-year-old former AUSA be appointed United States Attorney for the Southern District of West Virginia. President Carter adopted Senator Byrd's recommendation, and the Senate confirmed Judge King for that post.<sup>33</sup> As United States Attorney, Judge King burnished his reputation as a prosecutor who fearlessly took on "explosive, potentially political cases,"<sup>34</sup> "ceaselessly waged war" against white collar crime and public corruption,<sup>35</sup> and was "invariably . . . more interested in justice than in headlines."<sup>36</sup> For instance, from 1978 through early 1980 Judge King led an extensive criminal investigation of the American liquor industry and the Alcohol Beverage Control Commission of West Virginia.<sup>37</sup> This investigation resulted in the prosecution and conviction of more than forty individuals and corporations on various charges, including commercial bribery, mail fraud, extortion, and Racketeer Influenced and Corrupt Organizations Act (RICO) violations.<sup>38</sup> Most of these convictions were based on guilty pleas, but Judge King himself was the lead prosecutor at the trials of two of the defendants. Both cases resulted in convictions, which were later affirmed by the Fourth Circuit.<sup>39</sup> Not surprisingly, Judge King's tenacity as a prosecutor at times exposed him to death threats,<sup>40</sup> but he persevered. When Judge King left the office, the *Charleston Gazette* editorial page observed: "Would that the legal profession were sated with lawyers of his integrity and sense of purpose."<sup>41</sup>

That praise was later echoed by Judge K. K. Hall, who lauded Judge King's skill and intelligence as a prosecutor. Judge Hall, who presided over dozens of cases in which Judge King was an advocate, said that "[i]t was just

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<sup>31</sup> *Id.* at 28-29.

<sup>32</sup> *Id.* at 15.

<sup>33</sup> Paul Akers, *Court King: Experience Key Asset for New Prosecutor*, CHARLESTON DAILY MAIL, July 15, 1977.

<sup>34</sup> *King Looks Back on Four Years as U.S. Attorney*, CHARLESTON DAILY MAIL, Jan. 12, 1981, at 1B.

<sup>35</sup> *Needed: A Good Lawyer*, CHARLESTON GAZETTE, Mar. 11, 1981, at 6A.

<sup>36</sup> Editorial, CHARLESTON DAILY MAIL, Mar. 2, 1981, at 4A.

<sup>37</sup> King Questionnaire, *supra* note 23, at 34-35.

<sup>38</sup> *Id.*

<sup>39</sup> *United States v. Barber*, 668 F.2d 778 (4th Cir. 1982); *United States v. Margolis*, 612 F.2d 1311 (4th Cir. 1979).

<sup>40</sup> *King Looks Back on Four Years as U.S. Attorney*, *supra* note 34, at 1B.

<sup>41</sup> *Needed: A Good Lawyer*, *supra* note 35, at 6A.

magnificent the way [Judge King] tried a case.”<sup>42</sup> According to Judge Hall, Judge King was extraordinarily thorough and adept as a trial lawyer. This respect was reciprocal, for Judge King admired Judge Hall’s “unmatched dignity,” “unimpeachable integrity,” sense of humor, and long service to West Virginia.<sup>43</sup> (It was a testament to their mutual respect and close friendship that Judge Hall, despite struggling with a painful fatal illness at the time, served as de facto master of ceremonies at Judge King’s investiture as a Fourth Circuit judge and administered the oath of office.<sup>44</sup> At the close of this ceremony, Judge King “[could not] thank Judge Hall enough” for his guidance and support.<sup>45</sup>)

In 1981 Judge King returned to private practice, with a continuing commitment to quality lawyering and the highest ethical standards. He was instrumental in founding the law firm of King Betts & Allen (now called Allen Guthrie McHugh & Thomas), where he served as managing partner from 1981 to 1993 and from 1997 until his judicial appointment.<sup>46</sup> At his firm Judge King continued to represent high-profile clients. For example, he served as defense counsel for Governor Rockefeller in several federal civil rights suits brought against the Governor and officials of the West Virginia Department of Highways by former department employees, who claimed they were fired for political reasons.<sup>47</sup> Early in the litigation the district court denied the Governor and certain other defendants qualified immunity. Judge King argued the appeal of this denial in the Fourth Circuit, which held by a divided vote that it did not have jurisdiction at that stage of the case.<sup>48</sup> Despite this setback, Judge King succeeded in his representation of the Governor. During the trial of the lead case in April and May 1986, the district court directed a verdict in Governor Rockefeller’s favor, and the other cases against him were dismissed.<sup>49</sup>

Throughout his years in private practice Judge King devoted considerable time to the advancement of the legal profession. From early 1976 to the summer of 1977, while he was at the Spilman firm, Judge King served as counsel for the West Virginia State Bar’s Committee on Legal Ethics, which handles lawyer discipline in the state.<sup>50</sup> In that capacity he investigated complaints alleging violations of the rules of professional responsibility, and he represented the committee in disciplinary proceedings before the Supreme Court of Appeals

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<sup>42</sup> Judge K. K. Hall, King Investiture Ceremonies, *supra* note 3, at 36.

<sup>43</sup> Judge Robert B. King, Memorial Ceremony in Honor of The Honorable K. K. Hall, United States Court of Appeals for the Fourth Circuit 9 (Oct. 27, 1999) (transcript on file with author).

<sup>44</sup> *Id.* at 10.

<sup>45</sup> King Investiture Ceremonies, *supra* note 3, at 61, 65.

<sup>46</sup> King Questionnaire, *supra* note 23, at 3.

<sup>47</sup> *Id.* at 40-41.

<sup>48</sup> *Bever v. Gilbertson*, 724 F.2d 1083, 1084-88 (4th Cir. 1984).

<sup>49</sup> *See* King Questionnaire, *supra* note 23, at 40-41.

<sup>50</sup> *Id.* at 15.

of West Virginia.<sup>51</sup> Judge King later served the West Virginia State Bar as a member of its governing board from 1981 to 1984 and as a member of its Committee on Legal Ethics from 1984 to 1987.<sup>52</sup> Judge King was also a member of the Judicial Investigation Commission of West Virginia from 1990 to 1994.<sup>53</sup> This commission investigates complaints against West Virginia judges and gives advice and opinions to judges on matters of professional ethics.<sup>54</sup> In addition, throughout his time in private practice Judge King took on pro bono cases, representing clients who could not afford a lawyer. In 1990 Judge King represented (free of charge) Paul “Butch” Goode, the Wyoming County Prosecuting Attorney.<sup>55</sup> Goode had been a friend of Judge King at WVU, where Goode played on the basketball team and roomed with Jerry West.<sup>56</sup> Goode had financial problems stemming from bad health, a fire, and a divorce, and he was under indictment for failure to file federal income tax returns.<sup>57</sup> Judge King represented Goode at trial, where the government won a conviction.<sup>58</sup> Two years later, while still serving his sentence on home confinement, Goode overwhelmingly won reelection to the office of prosecutor.<sup>59</sup> Local reports were that Judge King’s client campaigned from his front porch, waving to potential voters as they passed by.<sup>60</sup>

Judge King also found some time for political activities. In 1982 he served as counsel to Senator Byrd’s reelection campaign, providing advice on a number of matters, including what the campaign considered improper advertising tactics by the National Conservative Political Action Committee.<sup>61</sup> In the

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<sup>51</sup> *Id.* at 52.

<sup>52</sup> *Id.* at 53.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Robert Bruce King, Remarks by the New Judges of the Circuit, 69th Judicial Conference of the United States Judges of the Fourth Circuit 13 (June 25, 1999) (on file with author).

<sup>56</sup> *Id.* at 14.

<sup>57</sup> *Id.* at 13.

<sup>58</sup> *Id.* at 14.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* Later, when Senators Byrd and Rockefeller recommended Judge King for the Fourth Circuit, Butch Goode sent the judge a letter pledging unqualified support. *Id.* at 15. The letter read:

King,

I hope you get that job in Richmond. I’ll come out for ya, if that’ll help, or I’ll come out against ya, if that’s best. . . . You don’t need my advice, but I’ll give it anyway. Read the damn Constitution and always call them as you see ‘em.

*Id.* As the latter portion of this article reveals, Judge King has followed Goode’s advice.

<sup>61</sup> Mark Ward, *Leaders Pushing Byrd Re-election Defend Letter to Broadcasters*, CHARLESTON DAILY MAIL, Mar. 10, 1982.



latter stages of the campaign Judge King also served as the repository for the senator's income tax returns and financial statements, making these documents available for public inspection. In addition, in 1983 and 1984 Judge King was counsel to Friends of Jay Rockefeller, the committee responsible for Senator Rockefeller's election campaign.<sup>62</sup> During the same period the judge was also counsel to the West Virginia Democratic Party.<sup>63</sup>

Senator Byrd and Judge King have much in common, beginning with their devotion to family. Senator Byrd recognized this bond at Judge King's investiture when he extended a special wish, based on an old Irish blessing, to the judge, his wife Julia, and their family. It was a wish for "work for your hands, a straight path for your feet, a coin for your purse, sunshine on your windowpane at evening, a song in your treetop at morning, soft rains for your garden, happiness in your hearts, love at your firesides, and God's blessings always."<sup>64</sup> Responding in part to these moving words, Judge King recognized Senator Byrd as the "paramount recipient" of his gratitude.<sup>65</sup>

Senator Byrd and Judge King also share a genuine dedication to the State of West Virginia. In 2001 the state legislature declared Senator Byrd "West Virginian of the Twentieth Century" in recognition of his exceptional service to the state.<sup>66</sup> This service was highlighted recently, in June 2006, when Senator Byrd became the longest-serving Senator in United States history.<sup>67</sup> With this same sense of commitment, Judge King serves West Virginia and its institutions in many ways in addition to his work as a judge. He has strong loyalties and ties to WVU, his alma mater and the state's flagship institution of higher education. Judge King currently sits on the WVU Alumni Association Board of Directors and serves as Vice Chair of the College of Law Alumni Association.<sup>68</sup> He regularly speaks at banquets and ceremonies on campus, cheers (as a letterman in his own right) for the Mountaineers, and has hired a number of WVU law school graduates to serve as his clerks. In 2003 Judge King received the Justitia Officium Award, the College of Law's highest honor.<sup>69</sup>

In a gesture that embodied both love of family and love of WVU, Judge King and his sister, Dean Mary Ellen Mazey, endowed a scholarship at the University in 2003 in honor of their mother's dedication to her children.<sup>70</sup> (Their

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<sup>62</sup> King Questionnaire, *supra* note 23, at 58.

<sup>63</sup> *Id.*

<sup>64</sup> Sen. Robert C. Byrd, King Investiture Ceremonies, *supra* note 3, at 59-60.

<sup>65</sup> Judge Robert B. King, King Investiture Ceremonies, *supra* note 3, at 66.

<sup>66</sup> Jim Wallace, *Honor More Than Just Another Nod: Colleagues Say Byrd Acted Differently This Time*, CHARLESTON DAILY MAIL, June 1, 2001, at 13A.

<sup>67</sup> Paul J. Nyden, *The Pillar of the Senate, Ten Presidents Later, Byrd Longest-Serving Senator*, CHARLESTON GAZETTE, June 12, 2006, at 1A.

<sup>68</sup> WVU Alumni - Robert B. King, *supra* note 17.

<sup>69</sup> *Id.*

<sup>70</sup> Press Release, West Virginia University, *supra* note 6.

brother, William E. King, passed away in 1995.) Her children's success is testimony to her steadfast commitment to their education. At the time of the endowment's creation, Dean Mazey had earned Bachelor of Arts and Master of Arts degrees from WVU and a Ph.D from the University of Cincinnati; she also served as Dean of the College of Liberal Arts at Wright State University.<sup>71</sup> She is now Dean of the Eberly College of Arts and Sciences at WVU. William had earned his law degree from WVU and had practiced law with distinction in Greenbrier County.<sup>72</sup> The Gladys Holyman King Scholarship is awarded annually to a sophomore enrolled in the Eberly College of Arts and Sciences from Greenbrier County who demonstrates academic promise and needs financial assistance.<sup>73</sup> The endowed scholarship stands as permanent recognition of Mrs. King's dedication to the education of rural youth.

President Clinton nominated Judge King to the Fourth Circuit on June 24, 1998, to the seat vacated when Judge K. K. Hall took senior status.<sup>74</sup> The Senate Judiciary Committee held a hearing on September 9, 1998, to consider the nomination. (Among other nominees considered that day was Judge William B. Traxler, Jr., of South Carolina, our colleague on the Fourth Circuit.)<sup>75</sup> West Virginia's senators, Byrd and Rockefeller, appeared at the hearing to express unqualified support for Judge King's confirmation.<sup>76</sup> Emphasizing Judge King's thirty years of legal experience, Senator Byrd noted that "this long service . . . equips Robert King with the requisite education and experience to serve as a Federal judge, but beyond this valuable experience, he also possesses the kind of deep-seated integrity, strong work ethic, and love of public service that . . . combines to make an outstanding member of the judiciary."<sup>77</sup> Senator Byrd, well-known for his exhaustive knowledge of ancient history,<sup>78</sup> also compared Judge King to Alexander the Great.<sup>79</sup> As Senator Byrd recounted, when a prosecutor came to Alexander to present an indictment, the Macedonian king "would put one hand over one ear and keep that ear closed. He kept that ear closed for the defendant. . . . He wanted to listen to both sides and give both sides equally an opportunity to have his attention. I believe that Bob King will

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> 144 CONG. REC. S7038 (daily ed. June 24, 1998).

<sup>75</sup> *Nominations of Robert B. King, William B. Traxler, Jr. to be United States Circuit Judges; H. Dean Buttram, Jr., Inge Prytz Johnson, Thomas J. Whelan to be United States District Judges*, 105th Cong. 1 (1998) [hereinafter King Nomination Hearing].

<sup>76</sup> *Id.* at 7, 10.

<sup>77</sup> *Id.* at 9 (statement of Sen. Robert C. Byrd).

<sup>78</sup> See M. Blane Michael, *The Power of History to Stir a Man's Blood: Senator Robert C. Byrd in the Line Item Veto Debate*, 108 W. VA. L. REV. 593, 595 (2006) (describing influence of Senator Byrd's "extensive study of the classics of Western civilization" on his view of governmental powers).

<sup>79</sup> King Nomination Hearing, *supra* note 75, at 9 (statement of Sen. Robert C. Byrd).

be the same [kind of judge].”<sup>80</sup> For his part, Senator Rockefeller celebrated Judge King’s dedication to public service. “In West Virginia, it is interesting that people often talk about the work ethic of our people,” Senator Rockefeller noted.<sup>81</sup> “Bob King simply works hard. He is incredibly fair. He is humble, with really very little to be humble about,” Senator Rockefeller added.<sup>82</sup> Acting upon the favorable recommendation of the Judiciary Committee, the full Senate confirmed Judge King to the Fourth Circuit on October 8, 1998.<sup>83</sup>

Senator Byrd and Senator Rockefeller summarized nominee King’s stellar record with complete accuracy. Few lawyers have ever come to the federal bench with broader experience than Robert Bruce King. During his thirty years of practice he tried over 120 cases and argued scores of appeals.<sup>84</sup> He spent about a third of his career as a federal prosecutor, prosecuting defendants in a wide variety of criminal cases, including those involving public corruption, election fraud, organized crime, drug trafficking, and fraud.<sup>85</sup> In private practice Judge King also handled a considerable number of criminal cases. He represented defendants charged with assorted offenses, including white collar crimes, RICO, tax fraud, mail fraud, criminal antitrust violations, and homicide.<sup>86</sup> He represented his share of indigent defendants, with those representations earning him a state-paid fee of \$50 per felony case at the start of his career.<sup>87</sup> The range of cases and matters handled by Judge King on the civil side is no less impressive. He represented both plaintiffs and defendants in innumerable civil proceedings, including those involving wrongful death, personal injury, products liability, professional malpractice, civil rights, securities, and employment benefits law.<sup>88</sup> He also prepared title reports as a young lawyer.<sup>89</sup> In short, there was little that Judge King had not done in the practice of law by the time he became a judge.

Judge King’s broad-scale experience makes the Fourth Circuit a much richer place. Of the judges sitting on the Fourth Circuit today, he is the only one to have served as United States Attorney. His special expertise in criminal law and procedure shows through. Judge King adhered to stringent professional

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 11 (statement of Sen. John D. Rockefeller IV).

<sup>82</sup> *Id.*

<sup>83</sup> Federal Judicial Center, Biographical Directory of Federal Judges, Robert Bruce King, <http://www.fjc.gov/servlet/tGetInfo?jid=2790>.

<sup>84</sup> King Questionnaire, *supra* note 23, at 23. Judge King’s trial skills and experience led to his election to the American College of Trial Lawyers. *Id.* at 6, 17.

<sup>85</sup> *Id.* at 14-16.

<sup>86</sup> *Id.* at 15-18.

<sup>87</sup> *Id.* at 14.

<sup>88</sup> *Id.* at 16.

<sup>89</sup> *Id.* at 14.

standards when serving as a federal prosecutor, and he demands that government lawyers hold to those same standards today. As he has emphasized, “[p]rosecutors have ‘a unique role in the criminal justice system, which regards them not just as advocates but as ministers of justice.’”<sup>90</sup> A prosecutor’s task is not merely to advocate for the government in seeking a conviction; as Judge King has explained, the prosecutor is “also obligated to seek to prevent the appearance and reality of unfairness.”<sup>91</sup> Moreover, Judge King has underscored the necessity for absolute neutrality on the part of a judge presiding in a criminal trial. This neutrality requires the trial judge to take great care in posing questions to witnesses, especially the defendant. Judge King has stressed that “[e]ven when the evidence provides the court with a negative impression of the defendant, the judge must refrain from interjecting that perception into the trial. He is always obliged to retain the general atmosphere of impartiality required of a fair tribunal, and must not – under any circumstance – become an advocate for the prosecution.”<sup>92</sup> Although Judge King is not reticent about criticizing prosecutorial or judicial conduct that violates these principles, his practical experience has sharpened his ability to distinguish between legal errors that require a conviction to be set aside and those that do not.<sup>93</sup> In addition, Judge King is a fierce protector of the inviolability of the jury deliberation process, as his dissents in *Robinson v. Polk*<sup>94</sup> reflect. There, disagreeing with the panel majority, Judge King argued that a federal habeas petitioner’s constitutional rights were violated when the jury obtained a Bible from the bailiff and consulted numerous Biblical passages during its deliberations.<sup>95</sup> This extrajudicial resort to a sacred text, Judge King believed, presented a great risk that the jury was improperly swayed.<sup>96</sup>

Judge King has also made substantial contributions to Fourth Circuit law in civil rights cases. He has demonstrated great respect for the congres-

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<sup>90</sup> *United States v. Rolle*, 204 F.3d 133, 138 n.7 (4th Cir. 2000) (quoting ABA/BNA LAWYERS MANUAL ON PROFESSIONAL CONDUCT, 61:601 (1999)).

<sup>91</sup> *United States v. Godwin*, 272 F.3d 659, 672 n.16 (4th Cir. 2001).

<sup>92</sup> *Id.* at 678 (punctuation omitted).

<sup>93</sup> *See Godwin*, 272 F.3d at 679-80 (determining that trial court’s improper questioning of defendant did not necessitate reversal because error did not affect substantial rights); *Rolle*, 204 F.3d at 140-41 (determining that even though the trial court erred in not allowing the defendant to attend voir dire, the defendant’s failure to object to the error, and his inability to show that the error affected his substantial rights, meant that the error was not grounds for reversal); *see also* *United States v. Turner*, 198 F.3d 425, 429-31 (4th Cir. 1999) (holding that the district court erred in prohibiting defense counsel from examining a government witness about her fear that she would be prosecuted for crimes more serious than those to which she had pled guilty if she did not cooperate with the government, but reasoning that the error did not affect the outcome of the proceedings and was therefore not a basis for reversal).

<sup>94</sup> 444 F.3d at 230-33 (King, J., dissenting from denial of rehearing en banc); 438 F.3d at 368-76 (King, J., dissenting).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

sional purpose behind the civil rights statutes, which were enacted to advance America's promise of equality to all. The two opinions Judge King wrote for the unanimous panel in *Spriggs v. Diamond Auto Glass*, in which an African-American, at-will employee alleged that he was fired because of his race, are illustrative.<sup>97</sup> In the first opinion the panel classified this allegation as a claim of purposeful racial discrimination in the termination of a contract.<sup>98</sup> The court held that at-will employment (as defined by state law) was a contract, permitting the plaintiff to state a claim under 42 U.S.C. § 1981.<sup>99</sup> Section 1981 prohibits racial discrimination in contract formation and enforcement and "specifically includes 'termination of contracts' as an aspect of making and enforcing contracts that is protected."<sup>100</sup> On this basis the panel reversed the district court's dismissal and remanded the case for further proceedings.<sup>101</sup> The case was appealed a second time, after the district court granted summary judgment to the defendants.<sup>102</sup> Speaking once again through Judge King, the court explained that genuine issues remained for trial, in part because there was enough evidence that the plaintiff's supervisor, by regularly using highly offensive racial epithets, had created a racially hostile work environment that was severe or pervasive.<sup>103</sup> Other circuits have relied on the opinions in *Spriggs* for guidance in employment discrimination cases.<sup>104</sup>

Judge King's fidelity to the broad remedial intent behind the civil rights statutes also informed his dissent in *Jordan v. Alternative Resources Corp.*<sup>105</sup> In that case an African-American plaintiff contended that he was fired in reprisal for reporting to his employer that a co-worker had used extremely ugly racial epithets. The panel concluded, among other things, that the plaintiff did not state a claim for retaliation under Title VII.<sup>106</sup> Judge King disagreed, arguing

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<sup>97</sup> 242 F.3d 179 (4th Cir. 2001) (*Spriggs II*); 165 F.3d 1015 (4th Cir. 1999) (*Spriggs I*).

<sup>98</sup> *Spriggs I*, 165 F.3d at 1020.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Spriggs II*, 242 F.3d 179.

<sup>103</sup> *Id.* at 184-86.

<sup>104</sup> See, e.g., *Cerros v. Steel Techs., Inc.*, 398 F.3d 944, 953 (7th Cir. 2005) (quoting *Spriggs II*, 242 F.3d at 188, to support the proposition that mere existence of an anti-harassment policy does not insulate the employer from liability for racial harassment); *Williams v. Admin. Review Bd.*, 376 F.3d 471, 478 (5th Cir. 2004) (citing *Spriggs II*, 242 F.3d at 186 n.9, as an example of a racial harassment case applying the affirmative defense standard originally crafted for sexual harassment claims); *Lauture v. IBM*, 216 F.3d 258, 260, 262-63 (2d Cir. 2000) (citing *Spriggs I*, 165 F.3d at 1018-19, and joining it in holding that "an at-will employee may sue under § 1981 for racially discriminatory termination.").

<sup>105</sup> No. 05-1485, 447 F.3d 324 (4th Cir. 2006), *withdrawn and reh'g granted*, No. 05-1486, 2006 U.S. App. LEXIS 20737 (4th Cir. Aug. 14, 2006).

<sup>106</sup> Title VII of the Civil Rights Act of 1964 prohibits discrimination based on a worker's "race, color, religion, sex, or national origin," 42 U.S.C. § 2999e-2(a), and its anti-retaliation section

that the majority's rule puts employees in a bind: either complain about racially offensive behavior and face retaliation, or do not complain about such behavior and forfeit any subsequent claims for judicial relief. Judge King noted that in drafting Title VII, "Congress exercised its considered judgment that [private suits] are an essential tool for ensuring compliance with Title VII's provisions,"<sup>107</sup> and he argued that the majority's ruling effectively undercut that legislative judgment.

Judge King has also written for the court in numerous constitutional cases. For example, in *Mellen v. Bunting*<sup>108</sup> several cadets at the state-operated Virginia Military Institute (VMI) contended that VMI officials violated the Establishment Clause in holding a daily supper prayer, during which students were required to stand and remain silent.<sup>109</sup> The district court granted the cadets prospective equitable relief but held that the cadets could not obtain money damages from the Superintendent of VMI because he was entitled to qualified immunity.<sup>110</sup> Judge King, writing for a unanimous panel, vacated the grant of prospective relief because the cadets, having graduated from VMI, could no longer claim ongoing injury.<sup>111</sup> The money damages claim survived, however, which required the court to examine the availability of qualified immunity.<sup>112</sup> The court concluded that the supper prayer violated the Establishment Clause.<sup>113</sup> It reasoned that the "adversative" instructional method used at VMI made the cadets "uniquely susceptible to [school] coercion" to participate in the religious exercise.<sup>114</sup> It also concluded that the prayer had the "primary effect of promoting religion"<sup>115</sup> and that through the prayer, VMI "took a position on what constitutes appropriate religious worship," rendering the prayer impermissible under Supreme Court precedent.<sup>116</sup> The court affirmed the qualified immunity ruling, however, because the Superintendent could not reasonably have known that his action was a violation of a clearly established constitutional right.<sup>117</sup>

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prohibits "discriminat[ion] against" a worker who has, among other things, "made a charge, testified, assisted, or participated in" a Title VII investigation, § 2000e-3(a).

<sup>107</sup> *Jordan v. Alternative Resources Corp.*, No. 05-1486, 2006 U.S. App. LEXIS 20737, \*67 (4th Cir. Aug. 14, 2006).

<sup>108</sup> 327 F.3d 355, *en banc reh'g denied*, 341 F.3d 312 (4th Cir. 2003), *cert. denied*, 541 U.S. 1019 (2004).

<sup>109</sup> *Mellen*, 327 F.3d at 362.

<sup>110</sup> *Id.* at 363.

<sup>111</sup> *Id.* at 364-65.

<sup>112</sup> *Id.* at 365.

<sup>113</sup> *Id.* at 377.

<sup>114</sup> *Id.* at 371.

<sup>115</sup> *Id.* at 374.

<sup>116</sup> *Id.* at 375.

<sup>117</sup> *Id.* at 376.

The defendants were unsuccessful in their efforts to obtain en banc and Supreme Court review of the court's opinion authored by Judge King.<sup>118</sup>

Judge King has, of course, been in disagreement with his colleagues on occasion, leading him to write dissenting opinions or dissents from the denial of rehearing en banc. It is in those opinions that Judge King's individual voice has often sounded most clearly. In *Ohio Valley Environmental Coalition v. Bulen*,<sup>119</sup> Judge King wrote a powerful dissent from the Fourth Circuit's denial of rehearing en banc. The case concerned eleven mining projects in West Virginia approved by the Army Corps of Engineers (Corps).<sup>120</sup> These projects entailed extensive valley fills and surface impoundments that were estimated to impact roughly 140,000 linear feet of West Virginia's streams.<sup>121</sup> The Corps had authorized these projects by issuing a nationwide permit that, plaintiffs alleged, circumvented the Clean Water Act (CWA) by allowing all sorts of environmentally damaging activities without first subjecting them to the CWA's notice requirements and other safeguards.<sup>122</sup> In the district court proceeding, Judge Joseph R. Goodwin concluded that the Corps' authorization procedure violated the CWA; the district judge accordingly ordered suspension of the eleven projects and enjoined the Corps from issuing similar authorizations in the Southern District of West Virginia.<sup>123</sup> The Fourth Circuit reversed this holding and denied the petition for rehearing en banc.<sup>124</sup> In his dissent from the denial of rehearing en banc, Judge King agreed with Judge Goodwin and expressed in forceful terms his opinion that Congress's mandate for the protection of a unique mountain ecosystem was not being followed:

[T]his case is of exceptional importance to the nation and, in particular, to the states in the Appalachian region. The Appalachian mountains, the oldest mountain chain in the world, are one of the nation's richest, most diverse, and most delicate ecosystems, an ecosystem that the mountaintop coal mining authorized by the Corps' general permit may irrevocably damage or destroy. In enacting the CWA, Congress mandated the protection of our environment through strict procedural requirements.

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<sup>118</sup> The Fourth Circuit divided evenly on, and therefore denied, a petition for en banc rehearing, with three circuit judges writing separate dissents from the denial. 341 F.3d 312 (4th Cir. 2003). The Supreme Court thereafter declined to review the case on certiorari. 541 U.S. 1019 (2004). Justice Scalia, joined by Chief Justice Rehnquist, wrote in dissent from the Court's refusal to review the case, leading Justice Stevens to write a reply, joined by Justices Ginsburg and Breyer, explaining why further review was not warranted. *Id.*

<sup>119</sup> 437 F.3d 421 (4th Cir. 2006) (King, J., dissenting from denial of rehearing en banc).

<sup>120</sup> *Id.*

<sup>121</sup> *Ohio Valley Env'tl Coal. v. Bulen*, 410 F.Supp.2d 450, 457 (S.D. W. Va. 2004).

<sup>122</sup> *Id.* at 456.

<sup>123</sup> *Id.* at 471.

<sup>124</sup> *Ohio Valley Env'tl Coal. v. Bulen*, 429 F.3d 493, 499-500 (4th Cir. 2005).

The panel's decision, in authorizing the Corps to skirt the CWA-mandated permitting process, undermines the enactment's primary purpose and poses unnecessary risks to one of this nation's great places.<sup>125</sup>

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At Judge King's investiture Senator Byrd said he had "every confidence" that the judge's "wisdom and intellect will help to light the course in constitutional waters that we all must follow."<sup>126</sup> Judge King has lived up to Senator Byrd's forecast not only in constitutional cases but also in every other aspect of the job. The exercise of sound judgment and the extension of courtesy to lawyers and colleagues have been the hallmarks of Judge King's service as a judge. The Fourth Circuit is known as a collegial court,<sup>127</sup> and Judge King does more than his share to keep that tradition alive. His contributions extend to all aspects of the court's business. For example, he serves on the Judicial Council, the small body of judges responsible for administering the federal courts in the Fourth Circuit.<sup>128</sup> Judge King is also a member of the U.S. Judicial Conference's Committee on Information Technology, and he chairs the subcommittee on planning and budget. Judge Robert Bruce King is blessed with irrepressible enthusiasm and energy, and he does all of his work with good cheer. I look forward to being his colleague for many years to come.

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<sup>125</sup> 437 F.3d at 424 (King, J., dissenting from denial of rehearing en banc) (citation omitted).

<sup>126</sup> King Investiture Ceremonies, *supra* note 3, at 59.

<sup>127</sup> See J. Harvie Wilkinson III, *Building a Legal Culture of Affection*, 99 NW. U. L. REV. 1235, 1241 (2005) ("I can say that the Fourth Circuit works very hard at being a collegial, and even an affectionate court.").

<sup>128</sup> See 28 U.S.C. § 332 (2006) (establishing role for judicial councils).



